International Law Cases in the Courts of the United States

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The efforts to discourage foreign countries from confiscating property and the question of reimbursement of U.S. citizens continue to appear in various issues in the courts of the United States.

Zschernig v. Miller, 412 P.2d 781 (1966)

Pauline Schrader, a resident of Oregon, died intestate on September 30, 1962, leaving an estate in Oregon of both real and personal property. Her next of kin were non-resident aliens residing in the Soviet-occupied zone of Germany. This area is recognized by Russia as a separate state, but not so recognized by the United States, and is popularly known as "East Germany."

An Oregon statute provides that property will escheat to the state of Oregon where claimed as inheritance by non-resident aliens, unless the heirs can prove the following three factors:

1. Reciprocal right of citizens of the United States similarly to take property from estates in the country of which the alien is an inhabitant or citizen.

2. The right of citizens of the United States to receive within the United States money originating from estates in such a foreign country.

3. Proof that the alien heirs will receive the benefits, free of confiscation in whole or in part, of money or property from estates in Oregon left to them.

The court found that the heirs, residents of East Germany, had failed to sustain the burden of proof required and the state of Oregon was awarded the estate.

Another issue is the application of the Treaty of 1923 between the United States and Germany (before the war and before the actual present, but unrecognized partition of Germany). The Supreme Court of the United States has agreed (No. 730) to rule on the

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constitutionality of the Oregon statute. The decision of the Supreme Court in this case will properly do much to clarify international law in the area of conflicts both of ideology and law between the Free and the Communist worlds.

Cases Nos. 63/2217 and 63/2467 *In Re Rights of N. V. Cabolent v. National Iranian Oil Company, Concerning Rights of Sapphire Petroleum Ltd., a Canadian Company,* District Court, The Hague, May 17, 1965

The foreign case is one decided by the District Court of The Hague, combining two pending cases identified as 63/2217 and 63/2467. In this combined case the court recognized that two theories of immunity existed, the absolute and the restricted; sovereigns are amenable to the courts of other countries, if jurisdiction can be obtained, for commercial liability under all circumstances if the damage complained of occurred under an *acta jure gestiones.* The determination of this case, therefore, rested on the facts as the courts found them and the interpretation of those facts. The court stated its position as follows:

> This state of affairs with regard to the economic activity of the State entails, however, that whenever a foreign defendant pleads an alleged right to immunity under international law, the Court will have to examine whether, in the matter of the dispute before it, that defendant has acted *jure imperii* as an organ of the foreign State that is to be identified with that State.

In 1951 the sovereign country of Iraq created a joint stock company to conduct the oil interests of that government. While connected in one sense with the confiscation of Anglo-Iranian Oil Company and the consequent series of cases and financial settlements made by the Anglo-Iranian Oil Companies, the issue here was on a new and different contract between NIOC (the government owned corporation entrusted with the oil business of Iraq) and a foreign corporation. The latter had been induced to enter Iraq by an agreement relating to the exploration and exploitation of petroleum in a certain area defined in agreement. The agreement was definite and was concluded in Iran on June 16, 1958. The court held that this agreement was governed by Iranian law, that NICO was an agent of the government of Iraq and must be considered to have all of the immunities which a sovereign govern-

ment would have. The court concluded that NIOC was entitled to the immunity of a sovereign acting *jure imperii.*

> Neither the fact that the agreement, which has no point of contact with the Netherlands legal sphere, makes provision for arbitration in the cases therein specified, nor the fact that NIOC had defended the present suit, can be seen as implying a waiver of the right to claim immunity.
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> The Court accordingly decides as follows:
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> DELIVERING JUDGMENT:
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> *in the joined cases*:
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> declares itself incompetent to take cognizance of the claims brought by the Plaintiff. . . .

The same question arises here which arose some years before on similar, if not identical, conditions: whether or not a concession agreement made by a country with a corporation, which is a national of another country, is a commercial contract and should be considered as a purely commercial undertaking or whether it must be considered as an act of state within that country because the agreement relates to the natural resources of a particular country, or is to be performed entirely within that country. The case, as reported, does not indicate how jurisdiction was acquired. But since NIOC defended the suit it must have appeared in the action and the court would have (under United States law) acquired jurisdiction.

Chemical Nat. Resources v. Republic of Venezuela,
420 Pa. 134, 215 A.2d 864 (1966)

The plaintiffs had purchased in 1952 mineral rights located in the municipality of Pilar, Sucre, Venezuela. Subsequently the plaintiffs, through another company, contracted with a department of the Venezuelan Government to erect facilities and convert certain emanations of physical steam into electrical power which the Republic of Venezuela (through one of its departments) agreed to purchase. They then expended large sums of money to carry out their part of the contract but thereafter the Government of Venezuela cancelled the contract and confiscated the property, which resulted in a loss of $116,000,000 to the plaintiffs. The case arose in Pennsylvania by the attachment of a ship belonging to a wholly-owned subsidiary of the Venezuelan Government. In short, here was an effort to subject certain property of a sovereign government for breach of its contract which, again, may be characterized as a concession

contract and, of course, the question was whether the court had jurisdiction to hear and determine this action against the sovereign State of Venezuela. The Tate letter was considered, as was also the case of *Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24 (1961). Also in this case, as in the *Vacuba* case, the U.S. State Department gave a suggestion of immunity and the court declined jurisdiction. In this case, however, one judge vigorously dissented and reviewed the cases involving the liability of sovereigns and, combining his arguments based on the Tate letter and the Sabbatino Amendment, came to the conclusion that sovereign immunity in this instance "is a relic of the law, overdue for interment in a legal museum." In short, the Justice felt that the contract should be considered a commercial transaction, and that a direct cause of action against the confiscating government was proper. The Government of Venezuela should be liable both as to jurisdiction and, too, as to judgment as is any corporation which is alleged to have broken a contract; and that Venezuelan commercial property should not be accorded immunity.

Flota Maritima Browning de Cuba. Sociedad Anonima v. Snobl, 363 F.2d 733 (1966)

This case is the latest in a series of steps in an effort at enforcing a contract between the nationals of the United States and a sovereign government, Cuba. Banco Para El Comercio Exterior de Cuba is (or was) a Cuban corporation which had been organized by the Republic of Cuba for the advancement of its foreign trade. This was prior to any of the confiscations conducted by Cuba. This Cuban state-owned corporation negotiated an agreement with an American citizen to operate certain vessels owned by the Government of Cuba. Pursuant to the agreement entered into by the parties, a Cuban corporation was formed whose name appears in the citation to this case. This Cuban incorporated, United States citizen's owned corporation was given an option to purchase the vessels but, controversy having arisen concerning the operation of the contract between the parties, a suit was instituted which resulted in a judgment permitting the national of the United States Flota Maritima to sell one of the vessels. The issue in the above cited case was raised in regard to the sovereign immunity of the vessel from sale since it was government owned. The question of general immunity had previously been decided in the case of

Flota Maritima Browning, Etc. v. Motor Vessel Ciudad de la Habana, 335 F.2d 619 (4th Cir. 1964), *affirming*, 218 F.Supp. 938 (1963)

The sovereign immunity question was raised not as to the claim of the vessel's immunity from arrest, but immunity from sale on the ground that, being property of a sovereign government, the vessel was immune from seizure in satisfaction of judgment. The court again decided against Cuba holding that when Banco Para El Comercio Exterior de Cuba and the Government of Cuba entered the case to contest the rights of the claimants they waived sovereign immunity for all purposes, including immunity from execution. There was, however, a dissent in the case which recommended holding the vessel as it was, even risking further deterioration, and an immediate trial of the issues to determine the rights of the parties prior to sale.

Columbia Nastri & Carta Carbone v. Columbia R. & C. Mfg. Co., 367 F.2d 308 (1966)

This case raises the questions of jurisdiction of a United States court to make an order which would have to be carried out in another country. In 1924 a certain United States corporation created an Italian corporation as its wholly-owned subsidiary to manufacture the same products in Italy as the parent company manufactured within the United States. Trademarks of that company to be used in Italy by that subsidiary were the same as those the parent company used in the United States and these were registered in Italy. At the time this Italian corporation commenced business, the Fascist Government of Italy was in control and because of its highly nationalistic complexion and antagonism to foreign interests, the trademarks were then registered in the name of the Italian corporation which was owned by American interests. In 1949 the stock of the Italian corporation was sold to Italian interests and in the memorandum of sale a royalty was provided. Under this agreement of sale the American company continued to furnish know-how and, among other things, granted the Italian corporation the exclusive permission to use in Italy the trademarks which had previously been registered in its name. Some 10 years later when relationships between the United States company and the Italian company had somewhat deteriorated, the Italian company stated that the Italian trademarks were its property and the royalty agreement was void. It was the Italian company which brought the action in the Southern District

of New York and this voluntary submission by the Italian company to the District Court in New York appears to have been one, if not the principal or controlling factor in the court's decision. In the suit the United States company counterclaimed against the Italian company and asked for an order directing that the company not be permitted to use the trademarks or the name of the American company in the Italian company's corporate name. It will be observed that such an order practically, if not necessarily, compelled affirmative action by the Italian corporation in Italy. The court observed: [T]he manufacturing and selling activities were restricted to Italy. . . . Nevertheless, the court held that this order was properly within the discretion of the New York courts because of its jurisdiction over the Italian company. The court held:

> Under the circumstances of this case, it is not a requisite to the issuance of the injunction that the applicant show that it can be enforced. . . .

Constructora Ordaz, N.V. v. Orinoco Mining Company, 262 F.Supp. 90 (1966)

The decision was on a motion requiring a determination of the "forum conveniens." The plaintiff, a Netherlands Antilles corporation, by a contract, was obligated to deliver prestressed concrete railroad cross-ties in Venezuela to the Orinoco Mining Company, a Delaware corporation doing business in Venezuela. The defendant urged that Delaware was not a "forum conveniens" because the contract was to be performed in Venezuela, that Venezuelan substantive law applied, and that the defendant's only contact with Delaware was its incorporation there. Defendant, therefore, wished the court to declare that the more convenient forum for the trial of the issues was Venezuela whose courts also had jurisdiction of the parties and the controversy.

The plaintiff insisted that Delaware was the more convenient forum since all of the plaintiff's witnesses, including experts, resided in the United States, and all testimony and documents would be in the English language, which, if the trial were moved to Venezuela, would have to be translated. The plaintiff also argued that it would get a fairer trial in the United States. The plaintiff argued further that a dismissal of this action with the privilege of commencing anew in Venezuela would foreclose the plaintiff from bringing any action since it had the financial resources to bring the action only

in Delaware. The court, observing that the problems of the "*forum non conveniens*" were not always easy, examined the contending issues and retained the case on the stated grounds that:

1. Contingent fee contracts between attorneys and clients are forbidden in Venezuela,

2. The courts of that country are slow in their procedures and expensive,

3. The plaintiff lacked financial resources to prosecute the suit effectively against a financially powerful adversary,

4. Pretrial procedures and subpoena procedure are superior in the District Court in the United States to those in Venezuela,

5. Retention of the case would obviate the need of translation into Spanish of every document and of the testimony.

These advantages overbalanced the interpretation which the defendant's business in Venezuela might suffer by the necessity of sending witnesses to Delaware.

Kirkland v. Sapphire International Touring, Ltd.,
262 F.Supp. 309 (1966)

An English automobile renting company was sued for injuries sustained by plaintiff, an American tourist involved in an accident alleged to be the fault of an English company in England. The facts show that on March 17, 1964, the English company, Sapphire International Touring, Ltd., through its N. Y. agent, contracted with the plaintiff in New York to rent an automobile to the plaintiff for use in England and to instruct the plaintiff in driving a motor vehicle in England and also agreed to drive the vehicle by its own supplied driver while the renter was being instructed. The action occurred while the English driver supplied by the English company was driving the car and the injured party was a passenger in it. The plaintiff alleged that he had sustained personal injuries in the amount of $350,000. The alleged agent was a New York corporation whose place of business was in New York where it rented automobiles for use in Europe. The Sapphire and American groups were independent of each other. However, the President of the American company had agreed orally to work with Sapphire and send business to them. The procedure was that the American traveller would use his travel agent to rent an automobile, specifying the make, in England. The travel agent would inform F.I.T. Car Hire Company ("FIT"), which would then ask Sapphire if a car would be available at the specified times.

FIT stated, in writing, that it acted only as agents for the owners providing the services listed and accepted no liability for loss, delay, etc. On these facts the court found that Sapphire was not a proper party to the action as it had never been served in the United States and that service upon FIT did not subject it to courts of the United States, nor did attempted service upon Sapphire in England grant jurisdiction to United States courts under any long-term statute.

Confederated Tribes of Umatilla Indian Res. v. Maison,
262 F.Supp. 871 (1966)

The issue here was between the restrictive laws of Oregon relating to hunting and fishing and a treaty concluded between the United States and the Confederated Indian Tribes. Since the Constitution of the United States provides in Article II, Section 2, that the President shall have the power to make treaties by and with the advice and consent of the Senate, whether or not a "treaty" with an Indian tribe should have accorded to it the same status as a "treaty with a foreign, independent and recognized government" has troubled the courts; for example, see *Cherokee Nation v. Georgia,* 5 Peters 1 (1831). In the case here mentioned the courts interpreted the "treaty" with the Indian tribe as the "supreme law of the land" and, therefore, superior to the conservation laws of the State of Oregon. The Confederated Indian Tribes contended successfully in their demand for a declaratory judgment that the state regulations which restricted hunting to certain lands would not apply to them because of the existence of the treaty. The court defined the issue as "whether a state is permitted to proscribe or limit the treaty rights of Indians without suing that such restriction is indispensable" and held that provisions of treaties with Indians must be construed as the Indian's understood them at the time of the agreement. Judgment was awarded to the Indian tribe.

Lee County School District Number 1 v. Gardner,
263 F.Supp. 26 (1967)

Courtright v. Pittman,
264 F.Supp. 114 (1967)

The above two cases may properly be contrasted on the question of the liability of sovereigns within their own courts. This is a significant question internationally in view of the general rule that a diplomatic claim does not arise against a foreign government

unless a citizen of some country acting through his own government claims damage by a foreign government and can show he has exhausted all local remedies afforded by the offending government.

The first case above mentioned, the *Lee County School District,* is not strictly against the government but against officials of the government who are alleged to have acted beyond the scope of their authority and, therefore, their actions are null and void since they are not properly the act of the United States Government. The doctrine of sovereign immunity, as the court found, does not apply in an action to prevent United States nationals from committing individually unlawful acts and, of course, the fact that they did so under color of authority would not prevent the damaged party from securing proper relief against those individuals.

Until the Court of Claims Act of 1855 this was the only method of securing redress against the acts of officials of the Government acting, or purporting to act, in that capacity. The Government of the United States could not be sued. The Government in such an instance was considered blameless since the laws were specific and did not give authority to those who executed the law to do damaging acts to citizens. This was not by the Government itself. This is the basis of one of the older and oft reported cases of *Brown v. United States,* 12 U.S. (8 Cranch) 110, 128 (1814).

In the *Lee County School District* case the alleged wrongful act was the withholding of federal funds for educational purposes and the issue turned on whether or not by the action of the School Board they were entitled to the funds or whether the action in withholding funds was a proper one.

The second case mentioned is *Courtright v. Pittman,* which was to enforce direct liability of the United States under the Federal Tort Claims Act. It was not until 1948, when this law went into effect, that anyone had a direct cause of action for tort against the Government of the United States itself. In the above case, Pittman (the defendant jointly with the United States Government), was an army serviceman who had been ordered from one post to another and, in making that journey in his own car, was involved in an accident. The court determined the issue of liability as it would have determined a corporation case, stating that the test to be used in determining whether the master (the United States Army) is liable, under doctrine of *respondiat superior* for acts committed by a servant, whom it had the right to control, not the actual detailed

control, and after reviewing the circumstances the court held that the United States was liable under the Colorado law applicable to torts.

Cotter Corporation v. Seaborg,
370 F.2d 686 (1966)

This case confirms that the United States cannot be sued without its consent. Unless the claim against the United States is strictly within the statutory provisions of those Congressional acts under which the United States has agreed to be sued the United States has sovereign immunity. However, wrongful acts of agents of the United States have no immunity.

Hellenic Lines, Ltd. v. Louis Dreyfus Corporation,
372 F.2d 759 (1967)

In this case Hellenic Lines, Ltd., moved to compel arbitration between itself and the Dreyfus Corporation. The latter corporation resisted the attempt on the ground, as alleged, that its agreement to arbitrate had been obtained by duress. Here is a situation in which a foreign corporation, which, in previously reported cases, had indicated its willingness to plead "sovereign immunity" sought to compel a United States corporation to arbitrate in a commercial dispute. Whether or not Hellenic Lines is or was an organization or arm of a sovereign government is here immaterial because it has always been the law in the United States that the government of a foreign country could sue a United States corporation on a commercial contract. The facts of this case are complicated and indicate a series of economic acts and counter actions which the court refers to as a "squabble." The Court of Appeals agreed with the District Court's conclusion that:

> '[B]ecause the facts suggest that Dreyfus, a large company, was substantially in an equal bargaining position with petitioner, it ill behooves Dreyfus to argue that it was the victim of serious economic duress in the classic legal sense.'

GMO. Niehaus & Co. v. United States,
373 F.2d 944 (Ct. Cl. 1967)

This was an action against the United States to recover compensation for the alleged unlawful vesting by the Attorney General on July 26, 1951, under the Trading With the Enemy Act (as amended). The funds seized were admittedly property of a cor-

poration which had been organized and existed within Costa Rica. It was also admitted that there was a German interest in that corporation, but the question before the court was the date at which that German interest had arisen. The facts are extremely complicated and involved not only the Trading With the Enemy Act but the effect of a treaty with Germany. Although the opinion is long and explicit the following brief statement will indicate both the decision of the court and its reason for that decision.

> As shown elsewhere in this opinion, the individual plaintiffs' rights in the seized property did not arise until December 1948 and January 1951, and therefore could not be vested by the Attorney General under the Trading With the Enemy Act because acquired after December 1946. By refusing to vest property in the United States acquired by Germans after that date, the Federal Government indicated that such property was not war-connected. It follows that, so far as this property was concerned, the plaintiffs' claim against the United States was not war-connected, nor did it arise out of the occupation of Germany. It was as if the property was brought into this country from Germany in 1948 and 1951, for sale here or other lawful purposes, and was then seized illegally by the Federal Government. . . .